

Phase III Findings

III. THE PHASE III ISSUE

455. Adams was formed in November, 1993. Adams Exh. 1. Adams filed its application in this proceeding for the purpose of obtaining a construction permit, and then building a station, in Reading, Pennsylvania. Tr. 2429-2430, 2465. Adams did not file its application for the purpose of entering into any kind of settlement pursuant to which Adams would dismiss its application. *Id.*

456. A number of Adams's principals had been principals of Monroe Communications Corporation ("Monroe"), which had filed a comparative renewal challenge in 1982 for a television station in Chicago. *E.g.*, Tr.2429-2430. After a decade of litigation which included two cases before the U.S. Court of Appeals for the District of Columbia Circuit, *In re Monroe Communications Corporation*, 840 F.2d 942 (D.C. Cir. 1988), *Monroe Communications Corporation v. FCC*, 900 F.2d 351 (D.C. Cir. 1990), the Monroe proceeding settled, with Monroe dismissing its application in return for approximately \$18 million. RBI Exh. 19. The Commission approved the Monroe settlement. RBI Exh. 22. In so doing, the Commission recognized that Monroe had not filed its application for the purpose of entering into a settlement. *Id.*, p. 3.

457. The Commission's rules concerning settlement of comparative renewal proceedings were amended in 1989, seven years after the filing of the Monroe application and five years before the filing of the Adams application. *Formulation of Policies and Rules Relating to Broadcast Renewal Applicants, Competing Applicants, and Other Participants to the Comparative Renewal Process and to the Prevention of Abuses of the Renewal Process*, 4 FCC Rcd 4780, 66 R.R.2d 708 (1989), *recon. denied*, 5 FCC Rcd 3902, 67 R.R.2d 1515

(1990). Under the revised rules, no for-profit dismissal of a comparative renewal challenger was permitted. The revised rules, however, did not apply to the particular class of proceedings to which Monroe belonged. *See* Adams Exh. 62.

458. Mr. Gilbert, a principal of both Monroe and Adams, was expressly advised of the change in settlement limitations in 1991. *Id.* He was therefore aware in 1994, when Adams's application was prepared and filed, that no for-profit settlement would be permitted under the Commission's rules. Tr. 2466. Mr. Gilbert so advised all Adams's shareholders before they invested in Adams. Tr. 2429-2430, 2467.

459. The fact that the Commission's settlement limitations had changed was immaterial to Adams because Adams was aware that, through the filing and successful prosecution of a "comparative renewal" application, it could acquire a valuable television broadcast authorization for considerably less than the fair market value of the existing station. Tr. 2430, 2467. This opportunity was attractive to Adams's principals who are experienced business and professional people and, in some cases, experienced broadcasters. *E.g.*, Tr. 2429, 2467; Adams Exh. 1.

460. Adams also recognized that the comparative renewal process afforded Adams the opportunity to provide a valuable public service by replacing "home shopping" programming which, in Adams's view, was not providing locally-originated programming serving the local public interest. Tr. 2457-2458, 2467-2468.

461. Adams was familiar with "home shopping" programming from the personal observation of a number of Adams's directors and also from research undertaken by Mr. Gilbert. Tr. 2468-2471; Adams Exhs. 63, 64, 65, 67. Adams understood that "home

shopping" stations generally did not provide locally-originated programming dealing with local community issues. Tr. 2468. This understanding was based on personal observation, *id.*, and on research materials reviewed by Mr. Gilbert in 1993. Tr. 2468-2471; Adams Exhs. 63-65, 67. Adams believed that a station which provided no locally-originated programming would be especially vulnerable to a comparative renewal challenge. Tr. 2457, 2468. ^{84/}

462. Motivated by its desire to obtain a low-cost television station while advancing the public interest, Adams sought to identify "home shopping" stations the license renewals of which were coming due and which would, as a result, be subject to comparative renewal challenge. Tr. 2471, 2473; Adams Exh. 66. The first such station was in Ontario, California. However, Adams did not have sufficient time to analyze that particular situation, and Adams therefore elected not to file an application for that market. Tr. 2474. Instead, Adams believed that the first such opportunity that "practically was available to us" was a station in Marlborough, Massachusetts. *Id.*

463. Adams then undertook a review of the programming of the "home shopping" station in Marlborough through two-weeks of taping of that programming and personal observation of the programming. Tr. 2474. Mr. Gilbert also interviewed residents of the Marlborough station's service area. Those efforts supported Adams's view of the merit of its position. Tr. 2474-2475. Adams did not file an application for the Marlborough channel, however, because Adams was unable to locate a non-short-spaced transmitter site. Tr. 2475-

^{84/} Mr. Gilbert had, as early as 1950, written a law review article addressing, *inter alia*, the importance of local public service by broadcast stations. "Newspaper-Radio Joint Ownership: Unblest Be The Tie That Binds", 59 Yale L.J. 1342 (1950).

2476.

464. The next "home shopping" station subject to comparative renewal challenge was Station WTVE(TV). Tr. 2476.

465. Adams retained the consulting engineering firm of Suffa and Cavell to assist in the preparation of the technical portion of an application for the Reading channel. According to Garrison Cavell, Adams's engineering consultant, as early as his initial contact with Mr. Cavell, Mr. Gilbert expressly advised Mr. Cavell of Adams's intention to provide locally-oriented news programming. Tr. 2390-2393; Adams Exhs. 73, 74. That information influenced the anticipated construction budget figures which Mr. Cavell provided to Mr. Gilbert. Tr. 2392-2393; Adams Exhs. 73, 74.

466. Mr. Cavell testified that, over the course of his more-than-two-decade career, he had prepared "many, many, many" broadcast applications. Tr. 2409. He also testified that he had perceived that some potential applicants with whom he had spoken seemed inclined to file applications for improper purposes. Tr. 2410-2412. In those cases, however, he "backed away", since he preferred not to get involved with parties acting in violation of the rules. Tr. 2411. He specifically testified that Adams was *NOT* such a situation. Tr. 2411-2412. To the contrary, Mr. Cavell testified that Mr. Gilbert had impressed him with the nature and detail of Mr. Gilbert's preparation. Tr. 2391.

467. Mr. Gilbert also negotiated for the use of the transmitter site which was to be specified in Adams's application. Tr. 2480. Prior to the filing of the application, Adams had reached an understanding concerning the availability of that site. That understanding is reflected in a letter from Adams's President, Robert L. Haag, to Steve Lubas of Conestoga

Telephone and Telegraph Company dated June 29, 1994. Adams Exh. 68. The record further reflects that Adams proceeded after its application was filed to finalize its arrangements relative to the tower site and to enter into a formal lease and option arrangement with the site owner. Adams Exhs. 69-71.

468. Adams also secured reasonable assurance of financing from the American National Bank and Trust Company of Chicago, a large Chicago bank. Adams Exh. 72.

469. During the preparation of Adams's application, Mr. Gilbert traveled to Reading a number of times. Tr. 1061. He spoke with 30-40 people there, including a representative of the Reading *Eagle*, the local daily newspaper, and was amazed that there was a "total absence of knowledge" of even the existence of Station WTVE(TV). Tr. 2476. He attempted to view the station's programming in a restaurant and bar which had television sets, but the station could not be received on those sets. Tr. 2479 (The station "wasn't on the screen. They didn't have it.").

470. Mr. Gilbert hired Paul Sherwood, a resident of the Station WTVE(TV) service area, Tr. 2156-2157, to make tapes of the station's programming in June, 1994. Tr. 2137; 2483-2484. Mr. Gilbert testified that he instructed Mr. Sherwood to tape the programming of Station WTVE(TV) or Channel 51. Tr. 2484-2485; 2554-2555. Mr. Gilbert recalled that Mr. Sherwood verified his ability to receive the channel. Tr. 2484-2485. In giving Mr. Sherwood his instructions, Mr. Gilbert emphasized Mr. Gilbert's interest in any and all public service matter (*i.e.*, matter other than home shopping programming) which Mr. Sherwood observed in the taping process. In response, Mr. Sherwood made extensive notations concerning such public service matter, recorded that information on spreadsheets

which were sent to Mr. Gilbert, and reported his observations to Mr. Gilbert during telephone conversations during the taping. Adams Exh. 76, 77, 87; Tr. 2145-2146, 2151-2153.

471. Mr. Sherwood, on Mr. Gilbert's instructions, recorded approximately 24 hours of programming on June 1-2, 1994, and shipped those tapes to Mr. Gilbert. Adams Exh. 76, 87; Tr. 2145-2146, 2477. Mr. Gilbert reviewed those tapes and concluded from that review that the tapes were, in fact, of Reading programming. Tr. 2487-2488. His conclusion was based on his observation of several PSA's which featured missing children from the Pennsylvania area. Tr. 2488. RBI's own evidence corroborates Mr. Gilbert's observation in this regard. RBI Exh. 47, Attachment E, p. E1. ^{85/}

472. Satisfied on the basis of that preliminary review that Mr. Sherwood was providing tapes of Station WTVE(TV), Mr. Gilbert authorized Mr. Sherwood to make another two weeks of tapes, 24-hours-per-day, and to ship those tapes to Mr. Gilbert by FedEx, using a FedEx shipping number which Mr. Gilbert provided. Tr. 2149, 2491, 2486-2487; Adams Exh. 87. Prior to the filing of the Adams application, Mr. Gilbert had received from Mr. Sherwood approximately 192 hours of tape representing eight days of

^{85/} RBI submitted an exhibit consisting of detailed analysis of the content of the tapes made by Mr. Sherwood. RBI Exh. 47. That exhibit establishes that two of the first three sets of PSA's on the first tape made by Mr. Sherwood on June 1, 1994 featured missing children from Pennsylvania. *Id.*, Attachments B, C and E. Mr. Gilbert's conclusion that the tape consisted of programming from Station WTVE(TV) was therefore not unreasonable. The reasonableness of his conclusion is further supported by the fact, established by one of RBI's public witnesses, that RBI did broadcast PSA's relating to missing children from a wide geographic area, and that such PSA's relating to children missing from the Reading area tended to be more the exception than the rule. RBI Exh. 28, p. 12.

programming. Tr. 2491; Adams Exh. 76. Mr. Gilbert reviewed those tapes prior to the filing of Adams's application. Tr. 2497.

473. As RBI's own evidence also corroborates, the tapes prepared by Mr. Sherwood and reviewed by Mr. Gilbert contain no programs which were locally-produced or locally-oriented to Reading. RBI Exh. 47. Instead, the programming on the tapes consisted of "home shopping" programming, with no "evidence whatsoever of a local broadcast presence". *Id.* The tapes thus supported Adams's view, developed both through Mr. Gilbert's visits to Reading and through Adams's general observations of and research into "home shopping" programming, that Station WTVE(TV) was not providing any locally-produced, locally-oriented programming addressing the needs and interests of Reading. Tr. 2497-2498.

474. Mr. Gilbert testified that the final decision on whether or not to file Adams's application was made after Adams was satisfied, on the basis of its review of the Sherwood tapes, that Station WTVE(TV) was not satisfying its obligation to provide public service programming to its viewing area:

Q Did your review of the tapes from Mr. Sherwood prior to June 30, 1994, influence Adams' decision to proceed with the filing of its application?

A Yes.

Q In what regard?

A Well, if the content had met what I regarded as the mandate of the statute, we wouldn't have filed. And we felt that it was egregiously short of the statutory requirements; that neither in content nor in the amount of time allocated were we getting anything of merit.

Q And how did that observation influence Adams' decision to proceed with the filing of its application?

A Well, at that point it was a final go-ahead. We talked about it, Mr. Haag and I, and decided that we as a competitor would be able to state that we would be able to provide programming which would be more responsive to the needs of the community.

Tr. 2498.

475. Adams thereupon filed its application on June 30, 1994. As indicated above, Adams did *not* file its application for the purpose of entering into any kind of settlement pursuant to which Adams would dismiss its application. Tr. 2465. Adams was aware that the Commission's rules as of the filing of its application prohibited the dismissal of Adams's application in return for consideration. Tr. 2465.

476. Five years later, in September, 1999, Mr. Gilbert determined that Mr. Sherwood taped a cable-feed of the Home Shopping Network, rather than the over-the-air broadcast of Station WTVE(TV). Tr. 2499. This arose from some misunderstanding between Messrs. Gilbert and Sherwood. The record is clear, though, that Mr. Gilbert believed that he had instructed Mr. Sherwood to tape Station WTVE(TV), Channel 51. Tr. 2484-2485; 2554-2555. Mr. Sherwood did not deny that Mr. Gilbert had instructed him to tape Station WTVE(TV) or Channel 51. To the contrary, he specifically stated that Mr. Gilbert "may have" mentioned Channel 51. Tr. 2139. But Mr. Sherwood's recollection was limited by the passage of time. *Id.* ("[Mr. Gilbert] may have [mentioned Channel 51], but it's so long, I don't recollect the specific station number.").

477. Mr. Sherwood's primary memory was that Mr. Gilbert wanted him to record the home shopping channel, Tr. 2139-2140, although Mr. Sherwood demonstrated repeatedly that he himself may have confused the terms "television station" and "television channel" because he understood those two terms to be synonymous. Tr. 2158. Mr. Sherwood was

not aware in 1994 that there might have been two separate sources of home shopping channel programming available in the Reading market, one source being over-the-air-broadcast Station WTVE(TV), the other being a cable-only home shopping channel. Tr. 2154. And he acknowledged that Mr. Gilbert, in his initial instructions, had referred repeatedly to "broadcast" service and "broadcast station". Tr. 2151-2154. Mr. Sherwood also remembered that Mr. Gilbert was interested in the amount of non-home shopping programming being *broadcast* on the home shopping channel in Reading. *E.g.*, Tr. 2151.

478. RBI alleged that Adams had engaged in settlement discussions primarily with Telemundo. ^{86/} However, the record clearly establishes that RBI's speculation concerning the Telemundo-Adams relationship was inaccurate.

479. RBI undertook extensive discovery of Telemundo, the company with which Adams supposedly discussed possible settlement arrangements. RBI also presented as a witness M. Anne Swanson, communications counsel for Telemundo. Tr. 2177-2311. The record developed by RBI concerning these matters does not support RBI's claim of substantial settlement-related discussions or negotiations between Adams and Telemundo.

480. In late April, 1999, shortly before this case was designated for hearing, Station WTVE(TV) was an affiliate of the Telemundo Spanish-language programming network. Telemundo was concerned that Station WTVE(TV) was in a comparative renewal proceeding and was at risk of losing its license. Tr. 2193-2198. Such a loss could have

^{86/} Mr. Gilbert testified that Adams had been approached a total of "two or three" times concerning the possibility of settlement. Tr. 2500-2501. The first of these approaches was made by Mr. Parker, the second by an unidentified individual. *Id.* Mr. Gilbert advised both that Adams was not interested in settling. Tr. 2502. The third approach arguably concerning the possibility of settlement was made by Telemundo. *Id.*

deprived Telemundo of an affiliate station. Accordingly, Telemundo consulted with its communications counsel, Ms. Swanson, concerning possible ways to avoid that result. *Id.*

481. Ms. Swanson suggested to Telemundo that it might be possible to arrange a settlement of the Reading proceeding by having a third-party -- *i.e.*, someone other than Telemundo -- serve as a "white knight" in a universal settlement. Tr. 2194-2196, 2205. Following up on that suggestion, Ms. Swanson initiated a series of telephone calls to counsel for RBI, the Bureau and Adams on or about April 28-29, 1999. The purpose of those calls was to "see if anybody might have any interest at all" in "somehow concluding the renewal proceeding". Tr. 2222.

482. Adams's counsel referred Ms. Swanson directly to Mr. Gilbert. According to Ms. Swanson, she spoke with Mr. Gilbert in late April, 1999, at which time Mr. Gilbert told her that Adams intended to continue to prosecute its application through the hearing process, but that Adams "wouldn't immediately off the bat say 'no'". Tr. 2221. Ms. Swanson observed that Mr. Gilbert

was never particularly interested in what I was calling and talking to him about, that he never really had a number, he never really seemed enthusiastic about what Telemundo thought it might think about doing to help make the license more secure in Reading.

Tr. 2226. Asked whether Mr. Gilbert gave her an "absolute no" with respect to settlement, she responded that his

actions certainly implied that I wasn't going to get anywhere. Whether or not he gave me an absolute no, I don't recall.

Tr. 2227.

483. One of the purposes of Ms. Swanson's initial contacts with Adams and RBI

was to determine if they would split the cost of an appraisal of Station WTVE(TV). *E.g.*, Tr. 2228-2229. The idea of obtaining such an appraisal came from Telemundo. Tr. 2237-2238. According to Ms. Swanson, the purpose of the appraisal was "to value the station so Telemundo could even figure out if it wanted to keep going and explore this idea."

Tr. 2229. Mr. Gilbert agreed that Adams would pay one-third the cost of such an appraisal. Tr. 2503-2503, 2543. He understood that Ms. Swanson's client and RBI would also each pay one-third. Tr. 2503, 2543.

484. The appraisal was completed in early June, 1999, and forwarded to counsel for Adams, who in turn forwarded it to Mr. Gilbert. Adams Exh. 75; Tr. 2503. Shortly thereafter, on or about June 7, 1999, Ms. Swanson spoke with both Mr. Gilbert and Adams's counsel. At that point, Ms. Swanson was not even sure that RBI would be willing to pay for one-third of the appraisal, much less enter into any settlement agreement. Tr. 2270-2271. Since her notion of a "white knight" settlement required the willing participation of both Adams and RBI, not to mention participation of some third-party to serve as the "white knight", *see* Tr. 2271, she was not in a position to discuss settlement. Tr. 2270-2272. And in Mr. Gilbert's view, settlement was not discussed. Tr. 2548-2549. Asked what was the outcome of that June 7 conversation, Ms. Swanson stated:

Certainly nothing happened. I mean I don't remember immediately right afterwards, I mean, it never led to anything, never led to negotiations, never led to a meeting. I mean I'd have to say nothing.

Tr. 2274.

485. The record does not reflect any further communications between Telemundo

and Mr. Gilbert concerning any possible settlement of this proceeding. ^{87/}

486. In July, 1999, Ms. Swanson spoke again with Mr. Gilbert at least once, and possibly twice. On July 14 and 15, 1999, Ms. Swanson was advised that, if Adams's application were granted, Adams would be interested in becoming a Telemundo affiliate. The record is not clear whether she was so advised by Mr. Gilbert or by Adams's counsel on July 14, Tr. 2227-2228, although it is reasonably clear that she spoke with Mr. Gilbert on July 15, 1999, Tr. 2281-2282. During that conversation Mr. Gilbert also suggested that Adams would be willing to meet with Telemundo to discuss such an affiliation. Tr. 2262, 2281-2282.

487. However, Telemundo was unwilling to engage in any discussions concerning any such agreement. According to Ms. Swanson:

I can guess . . . [that] Telemundo had concern, given the fact that I think they felt Mr. Parker was fairly litigious, whether they should even talk to anybody about an affiliation agreement, and we had an associate research it and we ended up deciding not to talk to anybody about an affiliation agreement at all. *So there were never any discussions about what would happen to the affiliation until the hearing was over. I mean we just didn't have any. It didn't go anywhere.*

Tr. 2286 (emphasis added).

^{87/} Ms. Swanson's daytimer calendar reflected a telephone call of ".1" duration (which Ms. Swanson indicated meant six minutes) during July, 1999 concerning "settlement". She testified that she believed that the notation indicated that the call was with Adams's counsel. Tr. 2284. She was not asked about the substance of that brief conversation or its circumstances, such as who initiated the call.

Phase III Conclusions

PROPOSED CONCLUSIONS OF LAW

I. INTRODUCTORY STATEMENT

488. The following conclusions of law address the issues in reverse order, *i.e.*, first the Phase III Issue, then the Phase II Issue, then the Standard Comparative Renewal Issue. Since the Phase III and Phase II Issues are both basic qualifying issues, disposition of either or both of those issues adverse to the subject party could obviate the need for comparative resolution of this proceeding. Accordingly, those qualifying issues are addressed first.

489. As set out in detail below, the Phase III Issue should be resolved favorably to Adams, resulting in a determination that Adams is fully qualified to be a broadcast licensee. By contrast, the Phase II Issue must be resolved *UN*favorably to RBI, which must be found to be *DIS*qualified to be a licensee. As a result, its license renewal application must be denied. The Standard Comparative Renewal Issue is also addressed below on a contingent basis, but resolution of that issue leads to the same result: RBI's renewal application must be denied, and Adams's application must be granted.

II. THE PHASE III ISSUE

A. PRELIMINARY STATEMENT CONCERNING THE SCOPE OF THE PHASE III ISSUE

490. Section 311(d)(3) of the Communications Act of 1934, as amended, in effect proscribes the filing of an application for the purpose of reaching or carrying out a settlement agreement. 47 U.S.C. §311(d)(3). Adams understands the Phase III Issue to have been designated pursuant to that statutory provision.

491. Adams notes, however, that not all of the four component sub-issues comprising the Phase III Issue are consistent with the statutory language of Section 311(d)(3).

For example, Sub-issue A contemplates inquiry into whether Adams filed its application
in the hope or expectation of achieving through litigation and settlement, a
"precedent" or other recognition that the home shopping television
broadcasting format does not serve the public interest.

The Act does not mention "hope" or "expectation", much less proscribe either. Rather, at most it implicitly proscribes the filing of an application "for the purpose of reaching or carrying out" a settlement. 47 U.S.C. §311(d)(3). Similarly, Sub-issues B and C refer to on-going misconduct, *i.e.*, whether Adams "continues to have" an intent to construct or whether it "is engaging in" an abuse of process. The Act, however, implicitly proscribes only the filing of an application for the purpose of reaching a settlement. In this case, the filing of Adams's application occurred in June, 1994, not today.

492. A core belief underlying Adams's challenge was and is that Station WTVE(TV) is not entitled to a renewal expectancy because it did not serve the public interest in the programming it broadcast while operating as a "home shopping" station. It is therefore possible, if not likely, that the instant litigation will establish that to some degree stations operating with "home shopping" programming may not serve the public interest. In Adams's view, such a determination would be to the good.

493. The legislative intent underlying the comparative renewal process was to provide just such a "competitive spur" to existing broadcasters to encourage superior programming performance. *E.g.*, *Formulation of Policies Relating to the Broadcast Renewal Applicant Stemming from the Comparative Hearing Process*, 27 FCC2d 580, 583 (1971) (referring to the comparative renewal process's "critically important competitive spur");

NBMC v. FCC, 589 F.2d 578, 579 (D.C. Cir. 1978) ("Congress also provided for a competitive spur to existing licensees by affording new parties an opportunity to apply for the same license"); *Deregulation of Radio*, 84 FCC2d 968, 984, 49 R.R.2d 1, 14, ¶37 (1981); *Central Florida Enterprises, Inc. v. FCC*, 683 F.2d 503, 507 (D.C. Cir. 1982); *Tele-Broadcasters of California, Inc.*, 58 R.R.2d 223, 234, ¶22 (Rev. Bd. 1985). It would be inconsistent with this clear statutory purpose to penalize Adams because Adams anticipated that, by pursuing the Reading challenge, it might successfully invoke this "competitive spur" notion.

494. Adams is concerned that the sub-issues as articulated by the Presiding Judge appear to extend well beyond the relative limited scope of Section 311(d)(3). Adams has not heretofore objected to this, because: (a) the sub-issues all seem to require at least some contemplation of "settlement" at some point by Adams before Adams might be deemed to have engaged in any misconduct and (b) Adams is confident that the record establishes that Adams has not at any time contemplated any settlement of this case. Thus, Adams easily passes muster notwithstanding the overbreadth of the issue. Still, the Phase III issue as articulated by the Presiding Judge is overbroad, and Adams notes this overbreadth here for the record so that all parties and the Court will be on notice that Adams believes the framing of that issue to be inappropriately overbroad.

B. THE PHASE III ISSUE MUST BE RESOLVED FAVORABLY TO ADAMS.

495. The Phase III Issue must be resolved favorably to Adams. The evidence clearly establishes that Adams filed its application for the purposes of acquiring a

construction permit for a new television station in Reading and constructing and operating that station. *See* Paragraphs 455-475, above. There is no evidence whatsoever of *any* improper intent underlying the filing of Adams's application, and in particular, there is no evidence whatsoever that Adams had any intent to enter into a settlement of any kind.

496. The fact that some Adams principals were also principals of Monroe, which entered into a for-profit settlement agreement in the Monroe comparative renewal proceeding, is of no consequence. The Monroe application was not subject to the limitations on settlements imposed by the Commission in 1989. RBI Exh. 22, p. 2, n. 3. Moreover, the record in the Monroe proceeding establishes that, notwithstanding the ultimate disposition of that proceeding in 1992, when the Monroe application was filed in 1982 it was *not* filed for the purpose of entering into any settlement, RBI Exh. 22, p. 3.

497. Prior to investing in Adams, Adams's principals were specifically advised of the Commission's 1989 settlement limitations. *E.g.*, Adams Exh. 62. The information concerning the 1989 limitations was provided to Mr. Gilbert in connection with the Monroe proceeding in 1991, long before Adams was even formed. *Id.* Thus, it cannot be said that the fact that Adams had been advised of the 1989 settlement limitations is itself any indication that Adams may have had some interest in settlement. Adams chose to file its application full in the knowledge that those limitations would bar any for-profit settlement akin to the result in Monroe. *E.g.*, Tr. 2466-2467. This is because Adams's goal was not to enter into any settlement, but rather to acquire a valuable television broadcast authorization at a bargain-basement price. *E.g.*, Tr. 2430, 2467.

498. The evidence establishes that Adams undertook the preparation of its

application diligently, obtaining appropriate assurances of financing and site availability. *See* Paragraphs 467-468, above. Adams's efforts to obtain assurance of the availability of its proposed transmitter site went considerably farther than the Commission's policies and precedent require. While those policies and precedent require only that an applicant have "reasonable assurance" of site availability ^{88/}, Adams executed and paid for formal lease and option agreements, firmly tying down the availability of the site for a period of years, *e.g.*, Adams Exhs. 69, 70. Such an extensive, long-term commitment runs directly counter to any suggestion that Adams did not intend to construct its station after successful prosecution of its application. Moreover, Adams's consulting engineer, a 20-year veteran involved in the preparation of "many, many, many" applications, testified that he was impressed by the nature and detail of Adams's preparation efforts. Tr. 2409, 2391.

499. Similarly, the evidence establishes that Adams made extensive efforts to research the operation of Station WTVE(TV). Had Adams simply chosen to target *any* "home shopping" station, then Adams could and would have filed its application against the Ontario, California station which filed its renewal application in late 1993. However, as Mr. Gilbert testified, because of the limited amount of time available to Adams, Adams did not believe that the Ontario station was "practically available". Tr. 2474. Accordingly, Adams chose not to pursue that opportunity. *Id.*

500. Instead, Adams focused on the Marlborough, Massachusetts station, which Mr. Gilbert had the opportunity to specifically research. His efforts included visits to the

^{88/} *See David Ortiz Radio Corp. v. FCC*, 941 F.2d 1253, 1257-1258 (D.C. Cir. 1991). In *Ortiz*, the Court reviewed the Commission's standards concerning reasonable assurance of site availability and pronounced those standards "liberal".

service area, interviews with people in the service area, and obtaining and reviewing tapes of two weeks of the station's programming. Tr. 2474. The Marlborough application was not filed because of Adams's inability to locate a non-short-spaced transmitter site. Tr. 2475-2476.

501. As to Station WTVE(TV), Adams spent considerable time and effort in researching the station, including trips to Reading by Mr. Gilbert and a multi-thousand dollar effort to tape two weeks of the station's programming. *See, e.g.*, Paragraphs 469-471, above. Adams's final decision to file its application was not made until Adams was convinced that Station WTVE(TV) was not in fact serving the public interest with programming responsive to the needs of its community and was, therefore, a suitable target for a comparative renewal challenge. Tr. 2498. Again, there is no indication here that Adams ever even considered the possibility of settlement. To the contrary, Adams's conduct consistently reflects a serious intention to prosecute its application to a successful conclusion, *i.e.*, a grant.

502. RBI was given full opportunity to undertake discovery concerning the Phase III Issue. Thus, had Adams in fact been involved in *any* settlement-related activities at all, RBI had the opportunity to discover evidence of such activities. The record reflects no such evidence. There is no evidence that Adams *ever* sought out, suggested, initiated or promoted the notion of settlement in any way.

503. At most, the evidence reflects that Adams was contacted on three separate occasions concerning some possible settlement. First, RBI's own Mr. Parker asked Mr. Gilbert if Adams would be interested in dismissing its application for payment;

Mr. Gilbert answered in the negative, terminating the conversation as quickly as possible.

Tr. 2500. Had Adams had any intent to settle, Mr. Parker's call would have presented the ideal opportunity to pursue some settlement negotiation. Having no such intent, Mr. Gilbert had no reason to do so and he acted accordingly, as the record clearly demonstrates

504. The second contact came in a call from an unidentified man asking Mr. Gilbert if Adams wanted to settle. Tr. 2501. Again, had Adams had any intent to settle, this second call presented yet another opportunity to pursue that intent. But again, since Adams had no such intent, Mr. Gilbert had no reason to do so and he terminated that call immediately. Tr. 2501-2502.

505. The third contact came in Ms. Swanson's call. *See* Paragraphs 478-485, above. Her call was unlike the two earlier contacts because neither she nor her client was seeking to settle the case; rather, the most that could be said was that she was looking for a way to obtain a prompt resolution of the Reading proceeding consistent with the interests of her client, Telemundo. *Id.* She was not in a position to make any settlement offer, and she did not in fact make any settlement offer. *Id.* All she did in her first contact was to ask if Adams would be interested in paying one-third of the cost of appraising the station. *Id.* Mr. Gilbert agreed to participate in the appraisal because it would provide a low-cost way of determining the station's value. Tr. 1095. Mr. Gilbert did not view that participation as engaging in settlement discussions. Tr. 2548-2549. Ms. Swanson's interpretation of Mr. Gilbert's response to her contact supports Adams's position here: she saw no indication that Adams was in fact interested in pursuing any settlement. *E.g.*, Tr. 2274.

506. Indeed, Adams's communications with Ms. Swanson undermine the notion that

Adams intended to settle the case and dismiss its application. After showing no interest at all in discussing any settlement possibilities with Ms. Swanson, Adams contacted her, advised her that Adams was confident that it will prevail in this case, and expressed interest in initiating discussions concerning an affiliation agreement with Telemundo. *See* Paragraphs 486-487, above. Ms. Swanson and Telemundo declined to join in any such discussions, and the matter went nowhere. *Id.* Still, the established fact that Adams expressed interest in a network affiliation is completely inconsistent with the speculative notion that Adams might not have intended to construct and operate the station for which it has applied.

507. In view of the foregoing, it is clear that Adams did not file its application for the purpose of entering into any settlement, nor has Adams at any time (with one very limited exception ^{89/}) participated in any discussions concerning any settlement in connection with its application. Accordingly, Adams has not engaged in any abuse of process or other misconduct, and the Phase III Issue must be resolved favorably to Adams. Adams is qualified to be a broadcast licensee.

^{89/} The single exception involves the discussions initiated by counsel for the Bureau who encouraged both Adams and RBI to consider some possible settlement. Those very preliminary discussions were referred to on the record before the Presiding Judge. Tr. 2499, 1564-1565. In response to the Bureau's strong suggestion, Adams indicated that it would be willing to participate in such discussions. However, to date Adams has seen no reciprocal interest on the part of RBI. While Adams has undertaken certain activities (*i.e.*, retention of a media appraiser) which Adams had told the Bureau Adams would undertake, Adams has proceeded no farther because of the lack of response from RBI.